United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 20, 2009

TO : James J. McDermott, Regional Director

Region 31

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: New Albertsons, et al.

Case 31-CA-28932 530-4090-5000

UFCW Locals 135, 324, 770, 1036, 1167, 1428, and 1442

Case 31-CB-12471

These cases were submitted for advice on the issues of: (1) whether New Albertsons, Ralphs, and Safeway ("the Employers") violated Section 8(a)(5) of the Act by refusing to bargain with the incumbent Union¹ over a contract for a newly certified professional unit during the term of a mixed professional/nonprofessional unit contract covering, among others, the employees in the newly certified professional unit; and (2) whether the Union violated Section 8(b)(3) of the Act by threatening to engage in an economic boycott of the Employers.

FACTS

I. The Section 8(a)(5) Charge

On December 5, 2003, the Guild for Professional Pharmacists filed an election petition seeking to represent the Employers' professional pharmacists, 2 who were at the

The current mixed-unit agreement lists the incumbent Union as the UFCW Locals 135, 324, 770, 1036, 1167, 1428, and 1442 chartered by the United Food & Commercial Workers International Union. The labor organization certified to represent the employees in the professional unit is listed as the UFCW Locals 135, 324, 770, 1036, 1167, 1428, and 1442 chartered by the United Food & Commercial Workers International Union; and UFCW Professional Division Locals 135, 324, 770, 1036, 1167, 1428, and 1442 chartered by the United Food & Commercial Workers International Union. For the purpose of this charge only, the UFCW Locals stipulate that they and the UFCW Professional Division are one and the same (hereinafter "the Union").

The professionals are the Employers' pharmacists, graduate pharmacists, and head pharmacists covered under the parties' 2007-2011 agreement (hereinafter "pharmacists").

time part of a historically voluntarily recognized mixed unit of professionals and nonprofessionals represented by the Union. The pharmacists comprised between 500 to 800 of the approximately 65,000 employees in the mixed unit. The Union intervened in the petition, which was blocked until July 2008.

Meanwhile, in 2007, the Employers and the Union began negotiating a successor collective-bargaining agreement covering the mixed unit.³ The Union's initial proposal, made in late January or early February 2007, included a request that the pharmacists be a separate bargaining unit. According to Andrea Zinder, a negotiator for the Union, there was no further discussion between the parties regarding the Union's proposal to treat the pharmacists as a separate unit.

On July 3, 2007, the Union made a comprehensive proposal to the Employers. Shaun Barclay, the Union's chief negotiator, stated at the time that the Union was not withdrawing its request for a separate bargaining unit for pharmacists, but that it was making its new proposal in order to make sure that the pharmacists' issues would not be totally overlooked in the negotiations. According to Zinder, aside from the Employers' offer to include a wage increase for the pharmacists, the Employers did not have any other response regarding the pharmacists.

According to Stephen DiCroce, a negotiator for the Employers, the Employers rejected the Union's proposal that the pharmacists be a separate unit. After that rejection, at the July 3, 2007 bargaining session, the Union presented its proposed changes to the contract's Appendix F, which details the provisions that apply solely to the pharmacists. The parties discussed the issues raised in the Union's proposal, including: pharmacist pay rates, the 401(k) plan, the inclusion of the pharmacists in the drug trust, the head pharmacy manager's differential, and holidays and Sunday premiums. DiCroce and Zinder both testified that there were no discussions during the 2007 negotiations regarding whether the agreement would continue in effect if an election occurred or what effect the petition would have on the mixed-unit contract.

Although there were no pharmacists on the negotiating committee, the Employers assert that the committee never included any employees (pharmacists or otherwise) and, moreover, that their historical exclusion was a decision of the Union.

While the petition was still pending, the Employers and the Union entered into a successor agreement covering the mixed unit with a term from March 5, 2007 through March 6, 2011 ("the Agreement"). Appendix F of the Agreement, which is about 9 pages long, details the additional provisions that apply solely to the pharmacists. Previous agreements between the Union and the Employers contained a similar Appendix F.

From July 21, 2008 through August 11, 2008, the pharmacists voted in a mail ballot election. According to the Stipulated Election Agreement, the pharmacists were asked two questions on the ballot, pursuant to the Board's decision in Sonotone Corp.⁴:

1. Do you wish to continue to be included in the same unit with nonprofessional bargaining unit employees currently covered under the 2007-2011 Retail Food, Meat, Bakery, Candy and General Merchandise Agreement between the Employer and UFCW Locals 135, 324, 770, 1036, 1167, 1428 and 1442 chartered by the United Food & Commercial Workers International Union?

To which the choice of answers will be "Yes" or "No."

2. Do you wish to be represented for the purposes of collective bargaining by GUILD FOR PROFESSIONAL PHARMACISTS, or UFCW Professional Division, Locals 135, 324, 770, 1036, 1167, 1428 and 1442 chartered by the United Food & Commercial Workers International Union, or not be represented by any union?

To which the choice of answers will be GUILD FOR PROFESSIONAL PHARMACISTS, or UFCW PROFESSIONAL DIVISION, or NO UNION. 5

On the first question, the pharmacists voted against remaining in the mixed unit. On the second question, the pharmacists chose the Union as their bargaining representative.

Following its certification, the Union sent letters to the Employers requesting that they begin bargaining over the newly certified unit of pharmacists. The Employers

⁹⁰ NLRB 1236 (1950).

⁵ All emphasis in original.

responded by letter, stating that they had no obligation to bargain over a separate contract for the newly certified unit because the current Agreement (including Appendix F) remained in effect.

II. The Section 8(b)(3) Charge

Some time in October 2008, the Union posted a bulletin entitled "Important Message to All Southern California UFCW Members" on its website, www.ufcwrx.org. The Union also distributed the bulletin to employees at the Employers' stores. The bulletin contained the following language:

If these employers continue to refuse to bargain with the UFCW on behalf of the Pharmacists, the UFCW Locals 135, 324, 770, 1036, 1167, 1428, and 1442 will be asking for your support. We will ask that all UFCW members refuse to fill any current or future prescriptions for you or your family at Albertsons, Ralphs, and Vons, until we are successful in achieving a fair contract for the Pharmacists. . . .

The UFCW Local unions will keep you informed if it becomes necessary to implement this show of solidarity.

The Union also distributed a memorandum to employees that contained the following language:

If your Employers do not agree to commence negotiations by October 20, 2008, the 7 UFCW local unions in Southern California are prepared to send letters to all UFCW members and then to other Southern California unions asking that prescriptions be temporarily transferred to another unionized pharmacy until the Employers negotiate in good faith.

On November 10, 2008, the Employers filed a charge with the Board alleging that the Union threatened a boycott in derogation of the Agreement's no-work-stoppage clause, 6 in violation of Section 8(b)(3). The Employers did not provide any evidence of actual boycott conduct.

The Agreement provides that "there shall be no cessation or stoppage of work, lockout, picketing or boycotts, except that this limitation shall not be binding upon either party hereto if the other party refuses to perform any obligation under this Article or refuses or fails to abide by, accept or perform a decision or award of an arbitrator."

ACTION

We conclude that the Employers did not violate Section 8(a)(5) because they had no obligation to accede to the incumbent Union's demand to negotiate a new contract for a newly certified unit of professional pharmacists during the term of a mixed professional/nonprofessional unit contract covering, among others, the newly certified professional unit. As to the Section 8(b)(3) allegation, we conclude that it would not effectuate the purposes and policies of the Act to issue a complaint against the Union under the particular circumstances of this case. Accordingly, the Region should dismiss both charges, absent withdrawal.

I. The Section 8(a)(5) Charge

There are no Board decisions or express statutory provisions that directly address this issue. After carefully weighing the various competing statutory, legal, and policy considerations, we have determined that, under the particular facts present herein, the Employers are not obligated to bargain with the newly certified unit of pharmacists over a new contract during the term of the current mixed-unit contract expiring in 2011.

To begin, there is no specific statutory requirement that the parties immediately bargain over a new, separate contract. While Section 9(b)(1) provides that the Board cannot decide a mixed unit to be appropriate unless a majority of the professionals vote for inclusion, there is nothing in that language or legislative history that addresses the applicability of an existing contract in the circumstances here. Nor has the Board always construed the statute broadly. For example, it has not interpreted Section 9(b)(1) to require that professionals be granted an immediate right to sever themselves from a mixed unit at any time. Thus, in Corporacion de Servicios Legales, 7 the Board applied contract bar principles to preclude a group of professionals from petitioning for a Sonotone election during the term of an existing agreement.

Board law lends support to the Employers' argument that the Union is bound to the existing contract. In RCA del Caribe, 8 the Board found that an existing contract remains binding when an incumbent union wins an election over a rival union to represent the same unit. The Board's

['] 289 NLRB 612 (1988).

^{8 262} NLRB 963 (1982).

rationale in that case and similar cases is that a vote for the incumbent union reflects employee sentiment ratifying the contract; also, holding the existing contract to be binding serves the policy of fostering stability in collective-bargaining relationships. Here, the pharmacists voted for the incumbent with the knowledge that there was an existing contract covering them until 2011. Further, there is no dispute that, at the time of the election, the pharmacists were working at the same locations and had the same functions and duties and the same working conditions as at the time the contract was negotiated. 10

Thus, the Board's policy goal of stabilizing labor relations weighs in favor of holding the parties to their contract for its duration. The parties undertook extensive and bona fide bargaining; agreement over the contract may well have been delayed if the parties had the uncertainty of the election and its results to take into account. As the Supreme Court has declared, "[t]he object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements . . "11 Here, that object is best promoted by giving effect to the Agreement.

Nor would the additional policy consideration of employee free choice and the special statutory treatment of professionals be unduly compromised, as the pharmacists are not foreclosed from bargaining separately but, instead, would be able to negotiate a new contract in 2011. Given the pharmacists' longstanding relationship with the Union and the fact that they had already been working under the 2007-2011 contract for over 16 months at the time of the election, it would appear that their selection of the

See The Kroger Company, 165 NLRB 872 (1967); Meat & Provision Drivers, 126 NLRB 572 (1960); American Seating Co., 106 NLRB 250 (1953).

The case relied on by the Union, <u>U.S. Tsubaki</u>, 338 NLRB 29 (2002), is distinguishable. <u>Tsubaki</u> involved a relocated unit, whereas by contrast the professionals here are working at the same location under the same conditions as before. Further, unlike the employees in <u>Tsubaki</u>, who were clarified out of the existing unit due to their relocation by the employer, the pharmacists here were given an opportunity to vote and chose the incumbent Union, knowing a contract covering them had already been negotiated.

¹¹ Auciello Iron Works v. NLRB, 517 U.S. 781, 785 (1996).

incumbent was a "ratification vote on [the] existing contract." 12

Significantly, we find that the separate community of interests of the pharmacists have not been subsumed, and indeed, have been shown to have been vindicated, under the facts here. Thus, the current mixed-unit contract treats the pharmacists as a separate and independent group in several important areas. Appendix F, which is about 9 pages long, details the provisions that pertain specifically to the pharmacists, including their hours, rates of pay, and 401(k) plan. That separate contractual treatment of the pharmacists indicates that the parties intended to address their special interests and not to subsume them. Notably, there is no indication that the Union breached its duty of representation to the pharmacists when it negotiated the Agreement covering the pharmacists as part of the mixed unit. Indeed, the Union's initial proposal included a request that the pharmacists be a separate unit, and the decision to continue negotiating over the pharmacists as part of the mixed unit was made to ensure that their interests would not be overlooked.

For the above reasons, the Employers did not violate Section 8(a)(5) by refusing to bargain over a new contract for the newly certified unit of professional pharmacists. Accordingly, the Region should dismiss the charge, absent withdrawal.

II. The Section 8(b)(3) Charge

We conclude that it would not effectuate the purposes and policies of the Act to issue complaint alleging that the Union's communications to its own members regarding a potential economic boycott constituted an unlawful threat. Given the present circumstances here, where a determination effectively has been made that the current mixed-unit contract is binding on the parties, we find that proceedings on the Employer's 8(b)(3) charge at this juncture are unwarranted.

Further, the Union presently has not directed a boycott nor has it ever communicated the threat directly to the Employers; rather, it disseminated the documents to its members shortly after filing the Section 8(a)(5) charge, perhaps in an effort to prepare them for the possibility of economic action in the event the Region issued a complaint. There is no evidence that the Union disseminated any additional boycott-related communications either before or

City Markets, Inc., 273 NLRB 469, 471 (1984) (Chairman Dotson, concurring).

after the Employers filed their charge, nor is there any evidence that the Union's members actually engaged in boycott activity.

If evidence arises at a later date indicating that the Union has engaged in boycott activity or that it has engaged in any other type of conduct establishing an unlawful threat, a complaint may issue at that time on an appropriately filed charge. In the particular circumstances of this case, however, we conclude that it would not effectuate the purposes and policies underlying the Act to do so at the present time.

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.